MAJU HOLDINGS SDN BHD

v.

FORTUNE WEALTH (H-K) LTD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
HASHIM YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NOS: W-02-965-01, W-02-964-01 & W-02-90-01]
25 SEPTEMBER 2004

CIVIL PROCEDURE: *Appeal - Further evidence - Admission of - Conditions - Whether evidence could have been obtained with reasonable diligence for use at trial - Whether would have an important influence on result of case - Whether apparently credible - Ladd v. Marshall - Rules of the Court of Appeal 1994, r. 7(3A) - Courts of Judicature Act 1964, s. 69(3) - Requirement for affidavit fully explaining why evidence was not called at trial court*

EVIDENCE: *Fresh or further evidence - Admission of, on appeal - Conditions - Whether evidence could have been obtained with reasonable diligence for use at trial - Whether would have an important influence on result of case - Whether apparently credible - Ladd v. Marshall - Rules of the Court of Appeal 1994, r. 7(3A) - Courts of Judicature Act 1964, s. 69(3) - Requirement for affidavit fully explaining why evidence was not called at trial court*

CIVIL PROCEDURE: *Appeal - Interference by appellate court - Findings of fact by trial court - Inferences drawn by trial judge - When may appellate court interfere - Primary discretion of court of first instance - Whether trial judge misdirected himself or committed error of law - Whether properly evaluated evidence - Whether inferences of fact consistent with evidence - Watt or Thomas v. Thomas - Clarke v. Edinburgh & District Tramways Co Ltd*

Pursuant to the terms of a 'call and put option agreement' ('the Agreement') entered into earlier between the plaintiff and the defendant, the parties granted each other option rights over 1,646,000 shares ('the option shares') in one Ipmuda Bhd. The defendant, however, did not exercise its 'call option'. The plaintiff, on the other hand, exercised its 'put option' on 27 April 1998. Thereafter, the defendant never responded, and the plaintiff commenced an action against the defendant claiming that it had breached the Agreement by failing to purchase the option shares upon the plaintiff exercising its 'put option'. Before the trial court, the defendant denied having entered into the Agreement, contending that if at all there was such an agreement, it would have been dated 1 April 1997 and not 21 April 1997. It was the defendant's contention that

the purported agreement date of 21 April 1997 was a fraudulent alteration of the true agreement date of 1 April 1997. (These dates were significant because the plaintiff's 'put option' was only valid for a seven-day period commencing immediately after the expiration of the defendant's 12-month 'call option' period. Thus, if the Agreement was dated 1 April 1997, then the defendant's 'call option' would have expired on 31 March 1998 and the plaintiff's 'put option' would, in turn, have expired on 7 April 1998.) The defendant also argued, inter alia, that the plaintiff was not the beneficial owner of the option shares and thus was not entitled to specific performance, and, further, that the purported consideration for the call option did not in law amount to good consideration. After a full hearing, the trial judge entered judgment in favour of the plaintiff and dismissed the defendant's counterclaim.

The instant appeal by the defendant to the Court of Appeal was one that turned entirely on its factual matrix, as did the case before the trial court. The one procedural and two factual issues that arose for decision before the justices of appeal herein were: (i) whether the defendant's notices of motion to adduce fresh evidence at the appeal should be allowed; (ii) whether the Agreement had all along been intended by the parties to take effect on 1 April 1997 although it came to be dated 21 April 1997; and (iii) whether the plaintiff was indeed the beneficial owner of the option shares at the material time.

Held (dismissing the appeal)
Per Abdul Kadir Sulaiman JCA delivering the judgment of the court:

[1] The defendant was unable to show that the fresh evidence it sought to adduce at the appeal could not, with reasonable diligence, have been obtained for use at the trial. The reception of fresh evidence at the appellate stage can only be justified upon the three cumulative and conjunctive conditions, as laid down in *Ladd v. Marshall* [1954] 1 WLR 1489, being satisfied, namely, that the evidence: (i) could not have been obtained with reasonable diligence for use at the trial; (ii) if given, would probably have an important, though not necessarily decisive, influence on the result of the case; and (iii) must be such as is presumably to be believed, or in other words, apparently credible, though not necessarily incontrovertible. These conditions are statutorily mirrored in r. 7(3A) of the Rules of the Court of Appeal 1994. In addition, s. 69(3) of the Courts of Judicature Act 1964 also qualifies the admission of further evidence upon 'special grounds' and the leave of the Court of Appeal. Thus, an application to admit fresh evidence must be supported by an affidavit which fully explains why the evidence was not called in the court below, and why it could not, by the exercise of reasonable diligence, have been obtained for use at the trial. (pp 289 e-h, 290 a-h & 291 a-d)

[2] Having evaluated the evidence of the witnesses and the contemporaneous documents with care, the trial judge came to a finding of fact that the effective date of the Agreement was 21 April 1997 and not 1 April 1997. He also found no evidence of any fraudulent alteration of the agreement date. (pp 289 a, 291 g-h & 292 a)

[3] The trial judge also found, as a fact, that the plaintiff was the beneficial owner of the option shares at the material time. (p 293 b)

[4] The Court of Appeal will not readily interfere with the findings of fact reached by the court of first instance with which the law has entrusted the primary discretion of evaluating the evidence. It is only in cases in which the appellate court is convinced that there was no judicial appreciation of the evidence by the trial court, or that the audio-visual advantages of the trial judge have been missed, or that the findings made by the trier of fact do not accord with the probabilities of the case – that it would be open to the appellate court to intervene and upset the factual findings of the trial court. (pp 294 e-h & 295 a-e)

[5] The learned judge had not misdirected himself or committed any error of law. Indeed, he had properly evaluated the whole body of the evidence and had drawn inferences of fact that were wholly consistent with the contemporaneous documentary evidence adduced. His findings of fact were entirely correct and there was simply no justification for any appellate intervention in them. (p 295 f-g)

[Judgment and orders of trial judge affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Berdasarkan terma suatu ‘perjanjian opsyen panggil dan letak’ (‘Perjanjian’) yang mereka meterai, plaintif dan defendan telah memberikan kepada diri mereka masing-masing hak opsyen kepada 1,646,000 saham (‘saham-saham opsyen’) syarikat Ipmuda Berhad. Defendan tidak melaksanakan hak ‘opsyen panggilnya’. Plaintif bagaimanapun telah melaksanakan ‘opsyen letaknya’ pada 27 April 1998. Walaupun begitu, defendan tidak bertindak balas, dan plaintif memulakan guaman terhadap defendan atas alasan bahawa defendan telah memungkiri Perjanjian kerana gagal membeli saham-saham opsyen setelah plaintif melaksanakan ‘opsyen letaknya’. Di Mahkamah Tinggi, defendan menafikan telah memasuki Perjanjian dan berkata bahawa jika perjanjian sedemikian wujud, maka ia sepatutnya bertarikh 1 April 1997 dan bukannya 21 April 1997. Menurut defendan tarikh perjanjian 21 April 1997 tersebut telah dipalsukan secara curang dari tarikh sebenar 1 April 1997. (Tarikh-tarikh ini penting kerana ‘opsyen letak’ plaintif hanya sah untuk tempoh tujuh hari bermula sebaik sahaja

tempoh 12 bulan 'opsyen panggil' defendan berakhir. Ini bermakna, jika Perjanjian bertarikh 1 April 1997, maka 'opsyen panggil' defendan akan berakhir pada 31 Mac 1998 dan 'opsyen letak' plaintif sebaliknya akan berakhir pada 7 April 1998). Defendan juga berhujah, antara lain, bahawa plaintif bukanlah pemilik benefisial saham-saham opsyen dan dengan itu tidak berhak kepada pelaksanaan spesifik, dan lagi, bahawa balasan yang dikatakan telah diberi untuk opsyen panggil adalah bukan balasan yang sah di sisi undang-undang. Selepas mendengar keseluruhan kes, yang arif hakim memberikan penghakiman kepada plaintif dan menolak tuntutan balas defendan.

Seperti di Mahkamah Tinggi, rayuan ke Mahkamah Rayuan oleh defendan berkisar sepenuhnya kepada persoalan fakta. Persoalan tunggal prosedur dan dua persoalan fakta yang berbangkit untuk pemutusan yang arif hakim-hakim rayuan di sini adalah: (i) sama ada kedua-dua notis usul defendan untuk mengemukakan keterangan baru di rayuan ini boleh dibenarkan; (ii) sama ada Perjanjian diniatkan berkuatkuasa pada 1 April 1997 walaupun bertarikh 21 April 1997; dan (iii) sama ada plaintif pada waktu material adalah pemilik benefisial sebenar saham-saham opsyen.

Diputuskan (menolak rayuan-rayuan)
Oleh Abdul Kadir Sulaiman HMR menyampaikan penghakiman mahkamah:

[1] Defendan gagal menunjukkan bahawa keterangan baru yang hendak dikemukakannya pada rayuan tidak dapat diperolehi semasa perbicaraan, jika diusahakan dengan cara munasabah. Penerimaan keterangan baru di peringkat rayuan hanya boleh dibuat jika ketiga-tiga syarat terkumpul dan konjunktif seperti yang disebut dalam *Ladd v. Marshall* [1954] 1 WLR 1489 dapat ditunaikan, iaitu, bahawa keterangan hendaklah: (i) tidak dapat diperolehi dengan usaha-usaha munasabah diperingkat perbicaraan; (ii) jika dikemukakan, berkemungkinan akan mempengaruhi, walaupun tidak sampai menentukan, keputusan kes; dan (iii) bersifat boleh dipercayai, atau dengan kata lain kelihatan menyakinkan walaupun tidak semestinya bersih dari sebarang pertikaian. Syarat-syarat ini adalah tercermin pada statut di bawah s. 7(3A) Kaedah-Kaedah Mahkamah Rayuan 1994. Selain itu, s. 69(3) Akta Mahkamah Kehakiman 1964 juga melayakkan penerimaan suatu keterangan lanjut atas 'alasan-alasan istimewa' dan kebenaran Mahkamah Rayuan. Oleh yang demikian, suatu permohonan untuk penerimaan masuk keterangan baru hendaklah disokong oleh afidavit yang menerangkan sepenuhnya kenapa keterangan itu tidak dipanggil di mahkamah dibawah, dan kenapa ia tidak dapat, melalui usaha-usaha munasabah, diperolehi untuk digunakan di perbicaraan itu.

[2] Setelah menilai keterangan saksi-saksi serta dokumen-dokumen kontemporari, yang arif hakim membuat dapatan fakta bahawa tarikh Perjanjian berkuatkuasa adalah 21 April 1997 dan bukannya 1 April 1997. Beliau juga mendapati tidak berlaku apa-apa pengubahan secara curang akan tarikh perjanjian tersebut.

[3] Yang arif hakim juga mendapati, sebagai satu fakta, bahawa plaintif adalah pemilik benefisial saham-saham opsyen pada waktu material.

[4] Mahkamah Rayuan tidak akan sewenang-wenangnya mengganggu dapatan-dapatan fakta yang dibuat oleh mahkamah pertama, yang diberi budibicara utama oleh undang-undang untuk menilai keterangan. Sesebuah mahkamah rayuan hanya boleh mengganggu dan mengubah dapatan-dapatan fakta mahkamah bicara dalam kes-kes dimana mahkamah tersebut gagal menilai keterangan-keterangan secara kehakiman, atau gagal memanfaatkan kelebihan audio-visual yang ada padanya atau jika dapatan-dapatan yang dibuat oleh hakim fakta tersebut bertentangan dengan kebarangkalian kes.

[5] Yang arif hakim tidak tersalah arah akan dirinya dan tidak melakukan apa-apa kesilapan undang-undang. Beliau malah telah menilai keseluruhan keterangan dengan sewajarnya dan telah membuat rumusan-rumusan fakta yang konsisten dengan dokumen-dokumen kontemporari yang ada. Dapatan-dapatan fakta beliau adalah betul sepenuhnya dan tiada alasan langsung bagi mahkamah ini untuk campurtangan.

Penghakiman dan perintah-perintah hakim bicara disahkan.]

Case(s) referred to:

Fortune Wealth (Hong Kong) Ltd v. Maju Holding Sdn Bhd [2002] 3 CLJ 329 HC ***(refd)***

Ing Merchant Bank (Singapore) Ltd & Anor v. Dato' Mohamed Anuar Embong [2001] 4 CLJ 73 CA ***(refd)***

Lam Soon Cannery Co v. Hooper & Co [1965] 2 MLJ 148 ***(foll)***

Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70 ***(foll)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 2 CLJ 146 SC ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69(3)

Rules of the Court of Appeal 1994, r. 7(3A)

Other source(s) referred to:

English Supreme Court Practice 1997, vol 1, p 1004

For the appellant/defendant - M David Morais (Khabir Dhillon); M/s Mohamad Illiayas & Co

For the respondent/plaintiff - VK Lingam (V Sithambaram & VK Lakshmi); M/s VK Lingam & Co

Reported by Gan Peng Chiang

JUDGMENT

Abdul Kadir Sulaiman JCA:

The Appeals

All these three appeals, Civil Appeal Nos. W-02-965-2001, W-02-964-2001 and W-02-90-2001 came up for hearing before us on 13 October 2003. With the consent of the parties it was decided that Civil Appeal No. W-02-965-2001 should be heard first and the decision in this appeal shall be binding on the other two appeals. This course was taken because the issues in both the appeals Nos. W-02-965-2001 and W-02-964-2001 have common features and raised common issues and also had identical pleadings. The issues raised in Civil Appeal No. W-02-90-2001 has also been raised in the other two appeals. A similar position was also taken in the High Court below where both cases were consolidated and it was decided that the decision in one case would bind the other case.

These three appeals before us has a historical significance. This panel of the Court of Appeal was the first panel constituted to sit in the new premises of the Court of Appeal in the Palace of Justice in Putrajaya. Hence these three appeals were the first substantive appeals to be heard before us. We had on 16 October 2003 dismissed all these three appeals with costs and we now give our reasons for doing so.

The material facts leading to these appeals before us had been marshalled with clarity by the trial judge in his judgment which was reported as *Fortune Wealth (Hong Kong) Limited v. Maju Holding Sdn Bhd* [2002] 3 CLJ 329. In order to avoid wholesale repetition we will only refer to the brief facts of the case.

Brief Facts

The appellant and the respondent entered into a call and put option agreement dated 21 April 1997. Under the terms of this agreement the respondent had granted to the appellant during the call option period, the call option to require the respondent to sell and/or cause or procure the sale by the respondent to the appellant 1,646,000 shares in Ipmuda Berhad free from all restrictions and all other encumbrances at the completion date at the option price of RM7.55

per share. The call option action may be exercised by the appellant by serving an exercise notice on the respondent during the call option period defined in the agreement as a period of 12 months from the date of the agreement.

Under the terms of the agreement the appellant had also granted to the respondent during the put option period, the put option to require the appellant to purchase and/or cause the purchase by the appellant the 1,646,000 shares in Ipmuda Berhad free from all restrictions and all other encumbrances at the completion date at the option price of RM7.55 per share. As provided for in the agreement, the put option may be exercised by the respondent by serving an exercise notice on the appellant during the put option period which is a period of seven days commencing from the date of expiration of the call option period.

It is common ground that the appellant did not exercise the call option to purchase the 1,646,000 shares in Ipmuda Berhad when the call option period of 12 months had expired on 20 April 1998. The respondent then exercised its put option on 27 April 1998 by serving an exercise notice on the appellant requiring the appellant to purchase the 1,646,000 shares in Ipmuda Berhad at the total option price of RM12,427,300 based on the price of RM7.55 per share.

The respondent's exercise notice was dated 27 April 1997 and it was duly served on and acknowledged by the appellant at 5.35pm under the hand of Suzanna Abdul Rahman. This exercise notice made reference to the agreement dated 21 April 1997. The appellant did not respond at all to this exercise notice issued by the respondent. The respondent's solicitors then proceeded to serve a letter of demand dated 13 May 1998 upon the appellant demanding that the appellant purchase or cause to be purchased the option shares at the total option price of RM12,427,300. This letter of demand also made reference to the agreement dated 21 April 1997. The appellant again failed to respond to the respondent's solicitors' letter of demand.

The respondent had also by letter dated 16 April 1999 addressed for the attention of Tan Sri Abu Sahid bin Mohamed, the Executive Chairman of the appellant, notified the appellant that it would proceed to force sell the option shares if no objection was received in writing from the appellant within 24 hours. Again the appellant did not respond. Subsequently the respondent's solicitors had by letter dated 9 November 2000 furnished the appellant's solicitors with an account of the force selling of the option shares. The appellant's solicitors again did not respond to this letter. The respondent then instituted legal proceedings against the appellant claiming various reliefs.

It is clear to us that all the above letters made clear and unmistakable reference to the agreement dated 21 April 1997 and the appellant did not respond at all or challenge or dispute the respondent's reliance and claims made upon the agreement dated 21 April 1997.

After a full trial the trial judge entered judgment in favour of the respondent for the sum of RM10,138,441.35 with interest thereon at the rate of 8% per annum with effect from 28 April 1998 to the date of realisation and costs. The appellant's counterclaim was dismissed with costs. The appellant then appealed to this court.

Motions To Adduce Fresh Evidence

We had on 16 October 2003 dismissed the appellant's two notices of motion to adduce fresh evidence at the hearing of these appeals. These notices of motion were filed by the appellant after the appellant's counsel had completed his opening submission and the respondent's counsel was in the process of completing his submission in reply.

In the notices of motion the appellant had prayed for an order that the affidavit of Tan Sri Abu Said bin Mohammed affirmed on 15 October 2003 including all exhibits annexed to his affidavit be admitted as fresh evidence at the hearing of the appeals before us.

We had after hearing both the appellant's counsel and the respondent's counsel dismissed both notices of motion with costs. We now give our reasons for doing so. We formed the view that the appellant's application to adduce fresh evidence through the affidavit of Tan Sri Abu Said bin Mohammed did not meet the first condition that it must be shown that the fresh evidence intended to be adduced at the appeal could not have been obtained with reasonable diligence for use at the trial.

It is trite law that there are three conditions which must be fulfilled by the appellant in order for fresh evidence to be admissible at the appellate stage. The test was succinctly formulated by Suffian FJ (as he then was) in *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70 in the following terms:

> This is an application for an order that the plaintiff/appellant be at liberty upon the hearing of his appeal to adduce further evidence.
>
> To justify the reception of this evidence "three conditions must be fulfilled:
>
> First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.
>
> These were the tests enunciated by Denning LJ (as he then was) in *Ladd v. Marshall*.

The said three conditions are cumulative and conjunctive and not disjunctive in that all the conditions must be fulfilled in order for the fresh evidence to be admissible at the hearing of the appeals in the Court of Appeal. The three conditions were also referred to by Thomson LP in *Lam Soon Cannery Co. v. Hooper & Co.* [1965] 2 MLJ 148 at p. 148:

> It is common ground that applications of this sort are regarded by this Court with considerable circumspection and the principles that have been applied in relation to them are stated as follows by Lord Denning in the case of *Ladd v. Marshall*:
>
> > To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible.
>
> I pause to observe that these conditions are not alternative; they are cumulative.

See also the judgment of the Court of Appeal in *Ing Merchant Bank (Singapore) Ltd & Anor v. Dato' Mohamed Anuar bin Embong* [2001] 4 CLJ 73.

Section 69(3) of the Courts of Judicature Act 1964 similarly states that further evidence can be admitted on special grounds only with the leave of the Court of Appeal. The tests formulated in *Ladd v. Marshall* is also enunciated in r. 7(3A) of the Rules of the Court of Appeal 1994.

It is also an essential requirement that an application to admit fresh evidence must be supported by an affidavit which should explain fully why the evidence was not called in the court below and why it could not by the exercise of reasonable diligence have been obtained for use at the trial. This requirement is clearly stated in the *English Supreme Court Practice* 1997 Vol. 1 at p. 1004 as follows:

59/10/14 Mode of application for leave to adduce further evidence ...

... The Application must be supported by an affidavit deposing the facts relied upon in support of the application. In particular the affidavit should explain fully why the evidence was not called in the court below, and where the *Ladd v. Marshall* criteria apply, why it could not, by the exercise of reasonable diligence, have been obtained for use at the trial ...

We found that the supporting affidavit affirmed by Tan Sri Abu Said bin Mohammed did not contain these relevant facts to fulfill the requirements for the admission of fresh evidence. In this particular case before us we were of the view that the appellant had failed to satisfy the first test as laid out in *Ladd v. Marshall*. We came to the conclusion that had the appellant exercised reasonable diligence the fresh evidence now sought to be adduced at the hearing of these appeals could have been obtained from the witnesses concerned at the trial of this action in the High Court below. We found that there was no merit whatsoever in the appellant's application to adduce the fresh evidence and we had accordingly dismissed the appellant's application with costs.

We now turn to the substantive appeals. The appellant's counsel had raised two main grounds in the appeals before us. These were also the very same grounds raised by the appellant in the High Court below. The first is the dating of the agreement. The appellant submitted that when the agreement was executed by the appellant under the seal of the appellant company it was blank as to the material particulars and the particulars were entered by the respondent without the consent or acknowledgement of the appellant. It was intended by both parties that the agreement was to come into force on 1 April 1997 and it is immaterial that the agreement was dated 21 April 1997. The appellant also alleged that the date in the agreement was fraudulently altered by the respondent from 1 April 1997 to 21 April 1997. The second ground advanced is that the respondent was not the beneficial owner of the option shares at the material time. The beneficial owner was said to be one Koh Kim Teck who was an agent of the appellant. The respondent was therefore in breach of the fundamental term of the agreement.

In our judgment this appeal turns upon pure questions of fact based upon the evidence and the credibility of witnesses who gave their evidence at the trial together with the contemporary documentary evidence. The trial judge had correctly addressed himself by stating that "in making a decision on this case, there is not much law involved but only hard facts are required". The trial judge had after very carefully evaluating the evidence of the witnesses and the contemporaneous documentary evidence came to a finding of fact that the

agreement was in fact dated 21 April 1997 and not 1 April 1997 as alleged by the appellant. The trial judge also held that there was no evidence of any fraudulent alteration of the date in the agreement. This is what the trial judge had to say at pp. 12 to 14 of his judgment:

> I have even at the close of this trial found no evidence of any such fraudulent alteration as alleged; nor was there produced to Court any other supporting document to the contrary by the Defendants, and took the stand not to refer P3 on the allegation to the Jabatan Kimia for their opinion; as I could then make an independent finding of fact on the evidence before me of DW3 Christopher Chew to the effect that when he returned the documents to the office of Mr. Koh Kim Teck, they were in blank and also after taking into consideration the evidence more particularly, the evidence of PW2 Mr. Phang Ah Hee – an advocate & solicitor who gave an unchallenged evidence to the effect that P3 was signed at his office on 21/4/1997 and he thereafter attesting and dating the document. In making a decision on this case; there is not much law involved but only hard facts are required; more particularly whether the said agreement – P3 was in fact dated on 21/4/1997 or 1st April 1997. The Defendant's solicitor Mr. David Morais at the hearing on 4th December 2000 in the making of an application, for the appointment of a Government Chemist to be appointed as a Court expert under O. 40 of the Rules of the High Court rightly said. "If the call option was dated 1 April 1997 as the Defendants contend – and not as 21/4/1997 as the Plaintiff's contend; then the issue is resolved and we don't have to go into other issues. This issue can be decided summarily." From the pleadings – the statement of claim; the amended defence; the counter claim and the reply and upon the evidence led by PW1 and PW2, the Plaintiffs case is established in that the said agreement was in fact dated 21/4/1997 and not 1/4/1997 as alleged by the Defendants witneses DW5 Encik Mohd. Fauzi Yon; and DW6 – Encik Hamidi Abdullah who were expressing hearsay evidence – not a single document in support – to show that they have a document with them which is dated 1/4/1997 for comparison. In fact DW3 Mr. Christopher Chew – the director who was personally responsible in obtaining the agreements from the office of Mr. Koh Kim Teck and seeing to their execution and sealing by the Directors of the Defendant company; and subsequently returning them to the office of Mr Koh had said, that the agreements when he returned to Mr. Koh's office were never dated with the date 1/4/1997. "The dates on the agreements were left blank. I am sure about that." With that evidence on record, I find as a fact that the agreement was in fact dated 21/4/ 1997; and not as 1/4/1997; and with that; the case is summarily decided on the main issue. The law of evidence is quite clear under s. 103 of the Evidence Act 1950; that he who asserts must prove that fact; and that onus was on the Defendants; which they had failed to do so. In the case of *Anderson v. Weston* [1840] 6 Bing. NC 296 it was held that when a deed is produced (as P3 in this case under the Defendant's seal) and the execution of the deed (P3) is proved by the subscribing witness (in this case by PW2 – an advocate & solicitor of the High Court KL affirming on Oath his having affixed his signature on 21/4/1997 immediately upon PW1

– representative of the Plaintiff had signed in his presence) the signature; and that deed bears a date – that date has uniformly been taken to be *prima facie* evidence that the deed (P3 in this case) was executed at the time when it purports to bear the date.

The judge also came to a finding of fact that the respondent was at the material time the beneficial owner of the options shares. The judge dealt with this issue in the following terms at pp. 15 to 17 of his judgment:

The defendants in their amended Defence and the Counterclaim alleged that the Plaintiffs were not at the material time the beneficial shareholders of the Ipmuda Shares. One just has to read Clause. (2) of the Recital (P3) which reads "the grantor is the beneficial owner of the number of ordinary shares ... as set out in the Schedule one; which schedule item 2 shows 1,646,000. The Court of Appeal (per Justice Dato' Sri Ram JCA) in the case of *Luggage Distributors (M) Sdn Bhd. v. Tan Hor Teng & Ors* [1995] 1 MLJ 719 at pages 746 and 747 said, "it is a cardinal rule in the interpretations of contracts that recitals may be taken into account as an aid to construction ... the Court may construe a recital as carrying with it an obligation to carry into effect that which is recited.

Further the Annual Report of Ipmuda Berhad was presented to the Ipmuda Board through its Executive Chairman Tan Sri Abu Sahid; who also happens to be the Executive Chairman of the Defendant company; and there said "on behalf of the Board of Directors, I am pleased to present this Annual Report for the year ended 31/12/1998." At p. 14 of the said Annual Report (please see Exh. P12) items (15) and (16) at p. 12 carries the name of the Plaintiff (Fortune Wealth Hong Kong Ltd.) as having a direct shareholding of 1,646,000 shares and by item (16) the Regalion Investment Ltd. – (the plaintiffs in Civil Suit D6-22-1634-1998) owning direct share holdings of 1,600,000 shares; and this information was given to Court by DW1 (Miss Chan Lai Choon the Company Secretary). In her evidence under cross-examination she said "I am aware that Maju Holdings – the defendants herein had entered into a Call and Put option agreement with the Plaintiffs." "That P11 & P12 are the Annual Reports (the statutory reports) to be made under Section 169 of the Companies Act; and such reporting is statutorily required to be made pursuant to KLSE listing requirement. Before these reports are printed, the Board of Ipmuda Berhad will approve the Audited Accounts ... The final decision on the annual reports – P11 & P12 is given by Mr. Loh Siew Choh. The executive Chairman of the Board Tan Sri Dato' Abu Sahid has seen the report before printing.

To a question by the court – whether the Chairman was aware of those statements, Miss Chan answered – "Yes."

a She also confirmed that P11 & P12 the Annual Reports were also sent to the shareholders of Maju Holdings – the Defendants herein; and upon her sending to them no objections from any of the share holders of Maju Holdings were received on the share holdings of Fortune Wealth Hong Kong Ltd. of 1,646,000 shares. Not even Tan Sri Abu Sahid raised any objection on the share holdings as shown in P12 p. 14, item 15. Further confirming that the b statement (in the Annual Report) is never wrong.

A similar pattern of confirmation on the share holding is noted from the cross-examination of Mr. Christopher Chew – DW3. "This annual report (P11) was approved by the Board of Directors of Ipmuda Berhad before I signed it at p. 22 and at p. 55 thereof. I confirm that all the information given in the c Annual Report is correct. I agree that under items 15 and 16 shows: Fortune Wealth (Hong Kong) Ltd. having a direct share holding of 1,646,000 shares in Ipmuda; and under item 16, Regalion Investment Ltd (the Plaintiff in the other suit-consolidated) is shown having direct share holding of 1,600,000 shares in Ipmuda. I agree that this information given there is accurate. When this report was approved by the Board of Directors of Ipmuda Berhad, I was d present with Tan Sri Abu Sahid in approving. I agree Tan Sri Abu Sahid has knowledge of this direct share holdings – under items 15 & 16 referred above when he was appointed as the Managing Director for Ipmuda Berhad in April 1997." This seals the issue of a fact that the Defendants had throughout knowledge of the direct/beneficial share holdings of the Plaintiffs e in Ipmuda Berhad.

We as an appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluating the evidence. It is only in cases where we as a Court of Appeal are convinced that there was no judicial appreciation of the evidence f adduced at the trial by the trier of fact, or that the audio visual advantage reserved to a trial judge had been missed, or that the findings made by the trial judge do not accord with the probabilities of the case, that it would be open to us to intervene and upset the findings made by the trial judge. The principles of appellate intervention have been laid down by the Supreme Court g in the case of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1993] 2 CLJ 146 at p. 148 and 149 in the following terms:

As regards the principles on which an appellate court may interfere with a lower court's findings of fact we would refer to the following passage in the judgment of Lord Guest in *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* h in which his Lordship stated as follows:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas v.* i *Thomas* [1947] 1 All ER 582 at p 587:

I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co Ltd* [1919] SC (HL) 35 at p. 37:

> In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

The judgment under appeal before us does not contain any misdirection or errors warranting our appellate interference. In fact after carefully scrutinising the appeal record and having heard the rival submissions of the parties' counsel we were fully satisfied that the learned judge had properly evaluated the whole body of evidence adduced at the trial and had drawn proper inferences of fact wholly consistent with the contemporary documentary evidence adduced in the case. The learned judge had come to correct findings of fact on the issues before him and had done all that was required of him by law. Hence we found no merits in the appellant's appeals before us.

We had also taken a second hard and careful look at the entire case before us. We are satisfied that the appellant had benefited from the call and put option agreements entered into with the respondent. In fact the evidence of the appellant's own witness DW3 Mr Christopher S.Y. Chew who was the Managing Director of IPU Sdn Bhd in the Maju Group of Companies had testified under cross examination as follows (See Appeal Record Bahagian B Page 387 to 389):

> All the 23,030,000 shares under the call and put option agreements offered by Maju Holdings to the Investors at RM6.50 sen per share were all taken up by the various investors. Eventually all the investors who took up the option under the call and put option agreements paid RM6.50 sen per share.

I confirm that the total transaction price was at RM5.50 sen per share but the total consideration of about RM150,000,000 was worked on the basis of RM6.50 sen per share. The total about RM150 Million came from the various investors who took up the Ipmuda 23,030,000 shares, under the call and put option.

By this call and put option exercise, Maju Holdings did not have to come up with any money up-front; because Maju Holdings have to purchase the shares from the investors at RM7.55 sen per share at the end of 1 year. The difference in the price of RM6.50 sen – the offered price; and RM5.50 sen per share the transacted price, was paid to Tan Sri Abu Sahid; who then paid to IGB; as told to me by Tan Sri. I confirm that a sum of RM23,030,000 was paid directly to Tan Sri Abu Sahid. I don't know whether Tan Sri Abu Sahid paid the sum to IGB.

The official contract notes were at RM5.50 sen per share and I have seen the contract notes for the whole 23,030,000 shares. I have not seen any contract notes or any documentary evidence showing the purchase per share at RM6.50 sen. I know that the sum of RM23,030,000 was paid to Tan Sri Abu Sahid; because I am the one who requested Mr. Koh Kim Teck from Seagroat & Campbell to pay directly into Tan Sri Abu Sahid's Account. Now shown enclosure 28 – pages 72/73. The fax dated 12th May 1997 and 13th May 1997.

Mr David Morais objects to this line of question and to the documents on the ground that whether or not a payment was made to Tan Sri Abu Sahid and for what purpose – are issues irrelevant to the trial and do not arise out of the pleadings or asserted at the Order 81 – summary procedure.

Court – Objection over-ruled as the Plaintiff is entitled to the tracing of payment being the difference of the RM1/- towards the price and the Plaintiffs are entitled to cross-exam on the relevant payments made! Mr Christopher Chew – I agree that this fax was sent by me to Mr Koh Kim Teck of Seagroat & Campbell on 12th May 1997.

> This was the second payment payable on the RM23,030,000; because the RM23,030.00 was payable in two installments. The first installment in the sum of about RM16 million had been paid earlier to Tan Sri and this was a call (Fax) asking for the second payment that was payable. Referred to enclosure (28) page 73 – the second installment was for RM7,308,507.50 sen. I confirm that this sum of RM7,308,507.50 sen being the second installment was paid to Tan Sri Abu Sahid. The Funding was successful by call and put option arranged by me and Mr Koh Kim Teck.

It was manifestly clear to us that under the various call and put option agreements the appellant had the benefit of 23,030,000 shares in Ipmuda Berhad worth about RM150,000,000 without having to come up with any money upfront. Tan Sri Abu Sahid Mohamed also received the payment of RM23,030,000. In these circumstances it will be wholly unjust and unconscionable for the appellant not to honour its obligations to purchase the options shares under the call and put option agreements entered into with the respondents. The parties must honour their commercial bargain entered into.

The trial judge had rightly entered interlocutory judgment in favour of Regalion Investments Limited, the respondent in Civil Appeal No. W-02-964-2001 and also ordered that the senior assistant registrar or the deputy registrar of the High Court to proceed to formally assess the general damages and/or other ancillary relief as prayed for by the respondent. Since interlocutory judgment has been entered the question of liability of the appellant to Regalion Investments Limited has been conclusively determined with finality and therefore the issue of liability of the appellant cannot be re-opened or re-agitated by the appellant during the assessment of damages. The duty of the senior assistant registrar or deputy registrar of the High Court is strictly confined to assess the quantum of damages that is payable by the appellant to Regalion Investments Limited. This is strictly a mathematical exercise involving the calculation of the total option price of the option shares and deducting the value of the force sold shares, if any.

We had therefore dismissed the above three appeals with costs. We also affirmed the judgments of the learned judge below and the orders made by him.

My learned brothers, Hashim bin Yusoff and Tengku Baharudin Shah bin Tengku Mahmud JCAs have read the draft and consented to it.